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Supreme Court, U.S.
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No. 95-1084

In The

Supreme Court of the United States

October Term, 1995

STATE OF ALASKA,

Petitioner,

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR, KATIE JOHN, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

KATIE JOHN, et al., Plaintiffs, vs. UNITED STATES OF AMERICA, et al., Defendants.	No. A90-0484-CV(HRH) Consolidated with No. A92-0264-CV (HRH)
STATE OF ALASKA, Plaintiff, vs. BRUCE BABBITT, Secretary of the Interior, et al., Defendants.	DECISION (Filed Mar. 30, 1994)

Introduction

The above consolidated cases are part of a group of cases under joint management,[1] all of which raise important issues concerning the interpretation and application of Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA). 16 U.S.C. §§ 3111-3126. During

[1] The jointly managed cases, in addition to those captioned above, are *Kluti Kaah Native Village of Copper Center v. State of Alaska*, No. A90-0004-CV, *Fish & Game Fund v. State of Alaska Bd. of Fisheries*, No. A92-0443-CV, *Peratrovich v. United States*, No. A92-0734-CV, *Native Village of Stevens v. McVee*, No. A92-0567-CV, and *Native Village of Quinhagak v. United States*, No. A93-0023-CV.

consultation with counsel for all of the parties in the jointly managed cases, a consensus was reached regarding the prioritizing of two issues to be decided by the court in these cases. These issues are: who is entitled to manage fish and game within Alaska for purposes of ANILCA, and where does ANILCA apply?

Background

Effective December 18, 1971, Congress adopted the Alaska Native Claims Settlement Act (ANCSA). Pub. L. No. 92-203 (85 Stat. 688).[2] Section 17 (d)(2)[3] of ANCSA made provision for the withdrawal from all forms of appropriation of 80 million acres of unreserved public lands in the State of Alaska for possible addition to or creation of national parks and the like. Section 17 (d)(2)(A). The Secretary of the Interior was required to make periodic recommendations to Congress with respect to such lands, Section (d)(2)(C), and, by Section (d)(2)(D), Congress had five years within which to act upon the Secretary's recommendations. Not until December 2, 1980,[4] did Congress finally adopt the "(d)(2)" lands bill.

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[2] 43 U.S.C. §§ 1601-1629a.

[3] 43 U.S.C. § 1616(d)(2).

[4] Plainly Congress did not complete its work on the (d)(2) lands issue within the five years Congress originally gave itself to accomplish this chore. When the 95th Congress adjourned in 1978 without adopting an Alaska lands bill, the Secretaries of the Interior and Agriculture exercised withdrawal authority which they possessed under Section 204(b) and (e) of the Federal Land Policy & Management Act to make new withdrawals, thus preserving the availability of land for (d)(2) legislation. The President also withdrew substantial additional

Pub. L. No. 96-487, (94 Stat. 2374).[5] Adopting the (d)(2) lands bill was not easy. The matter was under consideration by Congress during three presidential administrations and five sessions of Congress.

Through Title VIII of ANILCA, Congress addressed the important question of how all public lands, not just those in various management systems, should be used. More particularly, Title VIII embodied a congressional decision that those who chose to should have a right to continue to live off the land – to hunt and fish at will for sustenance. Congress found and declared in Section 801 of ANILCA[6] that:

> (1) the continuation of the opportunity for subsistence uses by rural residents of Alaska, including both Natives and non-Natives, on the public lands and by Alaska Natives on Native lands is essential to Native physical, economic, traditional, and cultural existence and to non-Native physical, economic, traditional, and social existence;
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> (2) the situation in Alaska is unique in that, in most cases, no practical alternative means are available to replace the food supplies and other items gathered from fish and wildlife which supply rural residents dependent on subsistence uses;

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acreage by proclamation for addition to national monuments. But for this action, the lands in question would have become available to selection by the State of Alaska under the Statehood Act or Alaska Native groups under ANCSA.

[5] 16 U.S.C. § 3101, *et seq.*

[6] 16 U.S.C. § 3111.

(3) continuation of the opportunity for subsistence uses of resources on public and other lands in Alaska is threatened by the increasing population of Alaska, with resultant pressure on subsistence resources, by sudden decline in the populations of some wildlife species which are crucial subsistence resources, by increased accessibility of remote areas containing subsistence resources, and by taking of fish and wildlife in a manner inconsistent with recognized principles of fish and wildlife management;

(4) in order to fulfill the policies and purposes of the Alaska Native Claims Settlement Act [43 U.S.C.A. § 1601 et seq.] and as a matter of equity, it is necessary for the Congress to invoke its constitutional authority over Native affairs and its constitutional authority under the property clause and the commerce clause to protect and provide the opportunity for continued subsistence uses on the public lands by Native and non-Native rural residents; and

(5) the national interest in the proper regulation, protection, and conservation of fish and wildlife on the public lands in Alaska and the continuation of the opportunity for a subsistence way of life by residents of rural Alaska require that an administrative structure be established for the purpose of enabling rural residents who have personal knowledge of local conditions and requirements to have a meaningful role in the management of fish and wildlife and of subsistence uses on the public lands in Alaska.

In Section 802 of ANILCA,[7] Congress further declared it to be national policy that:

> (1) consistent with sound management principles, and the conservation of healthy populations of fish and wildlife, the utilization of the public lands in Alaska is to cause the least adverse impact possible on rural residents who depend upon subsistence uses of the resources of such lands; consistent with management of fish and wildlife in accordance with recognized scientific principles and the purposes of each unit established, designated, or expanded by or pursuant to titles II through VII of this Act, the purpose of this subchapter is to provide the opportunity for rural residents engaged in a subsistence way of life to do so;
>
> (2) nonwasteful subsistence uses of fish and wildlife and other renewable resources shall be the priority consumptive uses of all such resources on the public lands of Alaska when it is necessary to restrict taking in order to assure the continued viability of a fish or wildlife population or the continuation of subsistence uses of such population, the taking of such population for nonwasteful subsistence uses shall be given preference on the public lands over other consumptive uses; and
>
> (3) except as otherwise provided by this Act or other Federal laws, Federal land managing agencies, in managing subsistence activities on the public lands and in protecting the continued viability of all wild renewable resources in

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[7] 16 U.S.C. § 3112.

> Alaska, shall cooperate with adjacent landowners and land managers, including Native Corporations, appropriate State and Federal agencies, and other nations.

After defining the term "subsistence uses",[8] ANILCA Section 804 established non-wasteful subsistence uses as having "priority" over the taking on public lands of fish and wildlife for other purposes.

With this background, we come to the statutory provision which is the focal point of the question: who is entitled to regulate the taking of fish and game on public lands in Alaska for subsistence purposes? ANILCA Section 805(d)[9] provides that:

> The Secretary shall not implement subsections (a), (b), and (c) of this section if within one year from December 2, 1980, the State enacts and implements laws of general applicability which are consistent with, and which provide for the definition, preference, and participation specified in, sections 3113, 3114, and 3115, of this title, such laws, unless and until repealed, shall supersede such sections insofar as such sections govern State responsibility pursuant to this subchapter for the taking of fish and wildlife on the public lands for subsistence uses. . . .

The State of Alaska enacted such a law. Indeed, the State of Alaska was so anxious to maintain its role as the sole regulator of fish and game in the state that it had enacted a subsistence law of its own two years before

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[8] ANILCA Section 803, 16 U.S.C. § 3113.

[9] 16 U.S.C. § 3115(d).

Congress finished the business of fine-tuning and enacting a federal subsistence law, Title VIII of ANILCA.[10] In due course, the Secretary determined that the State of Alaska was in compliance with ANILCA such that state law superseded federal subsistence law. As a consequence, the Secretary was not required to take action and there was no controversy over his role. It is undisputed that during this phase of the implementation of Title VIII of ANILCA, the Secretary's role was to monitor state subsistence activity, ANILCA Section 806,[11] and to carry on his other "closure and other administrative authority over the public lands[.]" ANILCA Section 805(c).[12]

By the mid-1980s, implementation of the state subsistence law for the benefit of rural Alaskans was in full swing. Not surprisingly, there was litigation. The State of Alaska had failed to provide plaintiff Katie John and

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[10] Ch. 151, Session Laws of Alaska, 1978. Sections (4) and (5) were the main operative provisions of this state act. They were codified as AS 16.05.251 and .255 (1978). There were difficulties with this initial act, for it was adopted by the state legislature before Congress had injected the "rural Alaska resident" concept into the preference afforded for subsistence uses of fish and wildlife into ANILCA. ANILCA Section 803, 16 U.S.C. § 3113. This situation is not relevant to this case, but is described in greater detail in an earlier decision of this court. *Bobby v. State of Alaska*, 718 F. Supp. 764 (D. Alaska 1989).

[11] 16 U.S.C. § 3116.

[12] 16 U.S.C. § 3115(c). The Secretary's closure authority is contained in ANILCA Section 816, 16 U.S.C. § 3126. The Secretary's "other" administrative authority is generally taken to have reference to the Secretary's power to manage all other uses of public lands such that appropriate habitat is available for fish and wildlife. ANILCA Section 810, 16 U.S.C. § 3120.

others with an opportunity to pursue their traditional fishing activities at a site known as Batzulnetas. In 1985, Katie John filed suit in this court, seeking enforcement of her subsistence rights. In this regard, Congress expressly provided for district court jurisdiction over the State as regards its implementation of ANILCA. ANILCA Section 807(a).[13] This was but one of a number of similar cases, some involving fisheries, others involving game.

From the court's perspective, the state subsistence program was working, albeit more slowly than rural Alaskans would have preferred. There were substantial legal difficulties, especially over the concept of what constituted "rural" Alaska. *Kenaitze Indian Tribe v. State of Alaska*, 860 F.2d 312 (9th Cir. 1988), *cert. denied*, 491 U.S. 905, 109 S. Ct. 3187 (1989). However, the court is convinced that the state subsistence program could and would have succeeded but for the discovery of a constitutional flaw. In 1989 (a rehearing was denied in March of 1990), the Alaska Supreme Court decided *McDowell v. State*, 785 P.2d 1 (Alaska 1989). In that case, the plaintiff successfully challenged the State subsistence program on the theory that the preference for rural Alaskans was unconstitutional. In this regard, the Alaska Supreme Court held:

> [T]he requirement contained in the 1986 subsistence statute, that one must reside in a rural area in order to participate in subsistence hunting and fishing, violates sections 3, 15, and 17 of article VIII of the Alaska Constitution.

McDowell, 785 P.2d at 9.

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[13] 16 U.S.C. § 3117(a).

In consideration of the fact that the Alaska Legislature would be in the session in the spring and early summer of 1990, the State of Alaska sought and obtained a stay of the operative effect of the *McDowell* decision. The Alaska Legislature failed to resolve the dilemma posed by the fact that Title VIII of ANILCA absolutely required a rural limitation in order for Alaska's subsistence law to qualify as a substitute for the federal subsistence scheme, whereas the Alaska Constitution prohibited such a residency requirement. Owing to the seriousness of this constitutional dilemma, the governor of the State of Alaska convened a special session of the legislature to take up the subsistence problem in June of 1990. Like the general session, the special session failed to find a solution to the problem.

In the meantime, the State of Alaska proceeded in the state superior court to obtain a determination of whether the exclusion of the rural preference provision of Alaska's subsistence law vitiated the entire state law or was severable. On June 20, 1990, the superior court ruled that the rural limitation was severable from the remaining portions of Alaska's subsistence law, and that the remainder of AS 16.05.258 was viable.

In the meantime, the Secretary, anticipating that he would be called upon to implement ANILCA as to federal lands, took action to promulgate temporary regulations for subsistence hunting and fishing in the State of Alaska. Summarizing his regulatory action, the Secretary stated:

> This rule provides temporary regulations implementing the subsistence priority for rural residents of Alaska under Title VIII of the Alaska

> National Interest Lands Conservation Act (ANILCA) of 1980. The Alaska Supreme Court recently ruled that the law used by the State of Alaska to provide the subsistence priority required by Title VIII violated the Alaska Constitution. The court's action placed the State out of compliance with Title VIII. Since the State has been unable to return to compliance with Title VIII, the Federal government is required to take over the implementation of Title VIII on public lands.

55 Fed. Reg. 27,114 (June 29, 1990). The Secretary's regulations became effective July 1, 1990, the date the *McDowell* decision was to be effective. Citing the shortness of time available for deliberation and the possibility for "chaos" if the State were able to reinstitute its program, the Secretary in substance adopted the former state subsistence hunting and fishing program. *Id.* The Secretary's implicit wish that the State would find a solution to its constitutional problem was not, nor has it yet been, fulfilled. In due course, the temporary regulations were supplanted by permanent regulations. These permanent regulations, among other things, created the Federal Subsistence Board and invested it with authority to adopt regulations for the day-to-day management of subsistence hunting and fishing on public lands in Alaska. 57 Fed. Reg. 22,940 (May 29, 1992).

I.

Who is Entitled to Manage Fish and Game within Alaska for Purposes of ANILCA?

The State has moved for summary judgment on Count III of its first amended complaint in *State of Alaska*

v. Babbitt [et al.], No. A92-0264-CV.[14] The motion is opposed, and the court has invited briefing from the parties to the other jointly managed cases, some of whom have submitted briefs on this issue. Oral argument has been heard and, after further analysis of certain aspects of this portion of the case, the court called for and received supplemental briefing. The State raises the fundamental question: does the Secretary[15] have specific authority to adopt a comprehensive scheme for fish and wildlife management on "public lands" as defined in Section 102 of ANILCA?[16]

There is no disagreement about the fact that the *McDowell* decision abrogated the rural preference provision of the Alaska subsistence law. There is no dispute but that the rural preference is an essential element of the federal program. ANILCA Section 803.[17] The State contends, largely upon Sections 805(a) through (c) and 1314 of ANILCA[18] and its analysis of the legislative history of ANILCA, that Title VIII simply does not vest the Secretary with authority to assume day-to-day management of fish and game for subsistence purposes on public lands. The federal defendants, as well as Katie John and others,

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[14] Clerk's Docket No. 113.

[15] Under ANILCA, the term "Secretary" means the Secretary of the Department of the Interior except as to National Forest System lands, in which case "Secretary" means the Secretary of the Department of Agriculture. ANILCA § 3102(12); 43 U.S.C. § 1618.

[16] 16 U.S.C. § 3102.

[17] 16 U.S.C. § 3113.

[18] 16 U.S.C. §§ 3115(a)-(c) and 3202.

insist that the combination of Title VIII and the *McDowell* decision required the federal government generally, and the Secretary in particular, to assume implementation of Title VIII of ANILCA.

ANILCA Section 803[19] unmistakably and unambiguously establishes a preference in favor of rural Alaskans as regards the taking of fish and wildlife from public lands. Although it is counter-intuitive to think that Congress would enact a law creating such a right and not authorize the Executive Branch to implement it, this contention of the State of Alaska is not without substance. However, for the reasons and upon the authorities discussed below, the court has concluded that unless and until the State of Alaska shall again be in compliance with section 805(d) of ANILCA,[20] the Secretary has the authority to adopt regulations for the purpose of implementing Sections 803,[21] 804,[22] and 805[23] of ANILCA.

ANILCA Section 805(a) requires the Secretary, in consultation with the State, to establish subsistence resource regions and local and regional advisory groups, "[e]xcept as otherwise provided in subsection (d)[.]" The Alaska subsistence law being out of compliance with Title VIII, the Secretary is plainly obligated to establish these subsistence resource regions and appoint local and regional advisory groups.

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[19] 16 U.S.C. § 3113.

[20] 16 U.S.C. § 3115(d).

[21] 16 U.S.C. § 3113.

[22] 16 U.S.C. § 3114.

[23] 16 U.S.C. § 3115.

ANILCA Section 805(b) requires that the Secretary assign staff sufficient to permit the local and regional advisory groups to do their work.

ANILCA Section 805(c) is the provision which is critical to the State's argument. It provides:

> The Secretary, in performing his monitoring responsibility pursuant to section 3116 of this title and in the exercise of his closure and other administrative authority over the public lands, shall consider the report and recommendations of the regional advisory councils concerning the taking of fish and wildlife on the public lands within their respective regions for subsistence uses. The Secretary may choose not to follow any recommendation which he determines is not supported by substantial evidence, violates recognized principles of fish and wildlife conservation, or would be detrimental to the satisfaction of subsistence needs. If a recommendation is not adopted by the Secretary, he shall set forth the factual basis and the reasons for his decision.

Section 805(c) speaks of the Secretary's monitoring responsibilities, his power to effect closures of certain lands for subsistence uses (ANILCA Section 816[24]) and his other administrative authorities over public lands, but says not a word about implementing the subsistence preference for rural Alaskans created by Section 803 or the subsistence priority created by Section 804. It is in this context that the State invokes the provisions of ANILCA Section 1314[25] which provide:

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[24] 16 U.S.C. § 3126.

[25] 16 U.S.C. § 3202.

> (a) Nothing in this Act is intended to enlarge or diminish the responsibility and authority of the State of Alaska for management of fish and wildlife on the public lands except as may be provided in [Title VIII of this Act[26]], or to amend the Alaska constitution.
>
> (b) Except as specifically provided otherwise by this Act, nothing in this Act is intended to enlarge or diminish the responsibility and authority of the Secretary over the management of the public lands.

Traditionally in the United States, and Alaska is no exception, the federal government has deferred to state fish and game regulators with respect to the management of fish and game on federal lands. *Defenders of Wildlife v. Andrus*, 627 F.2d 1238, 1248 (D.C. Cir. 1980). The Alaska Statehood Act[27] made express provision for the transfer of authority to manage fish and game to the State of Alaska after it had established an appropriate system and demonstrated its ability to assume responsibility for such management from the federal, territorial fish and game regulators. It is in this context that the State argues that it is entitled to continue management of fish and game on public lands unless Title VIII of ANILCA provides otherwise. Again, the State's contention is that Title VIII, as discussed above, does not provide otherwise. The State's

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[26] Title VIII of ANILCA was codified as subchapter II of chapter 51, 16 U.S.C. § 3111, *et seq.*

[27] Pub. L.No. 85-508 (72 Stat. 339), effective July 7, 1958.

foregoing position is underscored by the parallel provision of ANILCA Section 1314(b),[28] which serves to maintain the *status quo* as far as the authority of the Secretary.

Count III of the State's amended complaint calls upon the court to review the Secretary's construction of Title VIII of ANILCA. In *Chevron USA, Inc. v. Natural Resource Defense Council*, 467 U.S. 837, 843 (1983), the United States Supreme Court adopted a two-part test for evaluating agency construction of a statute. The court must first determine "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. If, having employed the traditional tools of statutory construction, the court determines that the intent of Congress is clear, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. In such situations, the court owes no particular deference to the administrators. The court must reject a statutory interpretation reached by administrative authorities that is contrary to the clearly expressed intent of Congress. *Id.* at n.9.

If the court determines that Congress has not clearly stated its intention either by the express language of a statute or otherwise – that is, if the court determines that there is a gap in the statute –

> [T]he court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's

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[28] 16 U.S.C. § 3202(b).

> answer is based on a permissible construction of the statute.

Id. at 843. The agency construction need not be the only possible interpretation, it must simply be a reasonable one.[29] *Id.* at 844.

It is difficult to square the Secretary's interpretation of Title VIII of ANILCA with the express language of these provisions. It is the Secretary's view that he must step in and implement ANILCA Section 804 following the failure of the state subsistence program implemented under ANILCA Section 805(d).[30] As discussed above, Congress has simply not enacted any express, direct authorization that the Secretary implement the rural preference and subsistence priority if the State does not do so.

As the United States Supreme Court makes clear in *Chevron*, the court may employ "traditional tools of statutory construction"[31] for the purpose of determining congressional intent. The State and the court have looked to the legislative history of ANILCA which is voluminous.[32]

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[29] The reasonableness test applies to agency action to fill statutory gaps which Congress has implicitly left to the agency. Where there is an explicit legislative delegation to the agency, an arbitrary or capricious test applies. No one contends that this is a case of explicit congressional delegation. Indeed, the State would seemingly not concede that there is any gap in this statute.

[30] 16 U.S.C. § 3115(d).

[31] *Chevron*, 467 U.S. at 837 n.9.

[32] This legislative history has been compiled and bound in 41 separate volumes, which take up nine feet of shelf space.

The State provided an initial analysis of legislative history pertinent to the question before the court. The court was not satisfied with this initial analysis and conducted an independent evaluation of the legislative history. That evaluation was the subject of a preliminary order.[33] In this order, the court invited the parties to file supplemental briefs, which have been filed and have been considered by the court.

The court's final appraisal of the legislative history pertinent to the question of whether or not the Secretary has primary authority to implement ANILCA Section 804 in the absence of a state program is contained in an appendix attached to this decision. As detailed in the appendix, Congress started out with the proposition that the Secretary, and he alone, would manage a subsistence hunting and fishing program for rural Alaskans. Through the various legislative sessions, the role of the Secretary was consciously and intentionally reduced, and the role of the State was correspondingly increased. The State accurately points out that Congress expressly rejected a program wholly within the control of the Secretary. It simply does not follow, however, that Congress intended that the State continue day-to-day management of fish and game for subsistence purposes, in the absence of a state law of general application sufficient to supersede ANILCA Sections 803 through 805. *See* ANILCA Section 805(d).[34] The court concludes that Congress unintentionally and inadvertently omitted an express provision

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[33] Order re Motions for Summary Judgment on the "Who" Issue, filed November 22, 1993 (Clerk's Docket No. 163).

[34] 16 U.S.C. § 3115(d).

authorizing the Secretary to implement Section 804 in the absence of a state program.

By ANILCA Section 814,[35] Congress expressly authorized the Secretary to promulgate, "such regulations as are necessary and appropriate to carry out his responsibilities under this [Title]." Congress having unequivocally given the Secretary regulatory authority, he was empowered to fill the statutory gap so as to implement not only the policy contained in ANILCA Section 802,[36] but also effect the substantive preference established by ANILCA Section 803[37] for rural Alaskans.

The final step in the analysis required by *Chevron* involves the question of whether or not the agency decision embodies a reasonable interpretation of the statute. In this instance, the Secretary's interpretation may be the only reasonable one which could follow the State's forced withdrawal from a qualifying subsistence program. Certainly implementation of ANILCA Section 804 by the Secretary through the creation of a Federal Subsistence Board was *a* reasonable response, even if it were not the only possible response to the failure of the state program. The State cannot say that the Board's initial regulations were unreasonable, for the Board in substance adopted the State's pre-*McDowell* subsistence program through temporary regulations. This action provided a smooth transition from state to federal management of the rural subsistence program for public (federal) lands.

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[35] 16 U.S.C. § 3124.

[36] 16 U.S.C. § 3112.

[37] 16 U.S.C. § 3113.

The State has made a number of other arguments in support of its position. One of them is particularly intriguing. The State argues that, despite *McDowell*, it may voluntarily submit to the jurisdiction of this court for purposes of carrying out a qualifying subsistence program as to public (federal) lands. The State seems to argue that it can carry out such a program without doing violence to the Alaska Constitution as applied to subsistence programs in *McDowell* so long as such program is effected through a court decree.[38]

What the State urges is problematic and is rejected for a number of reasons.

Firstly, the State is no longer in compliance with the requirements of Section 805(d),[39] and therefore federal court jurisdiction over any state program is very dubious. The court is unable to identify, and the State has not suggested, the source of power for a state fish and game regulator to take action to implement a rural Alaskan preference. Since *McDowell*, no state law may constitutionally authorize such. Even if that obstacle were overcome, what the State suggests smacks of a violation of the separation of powers doctrine.

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[38] ANILCA Section 807(a), 16 U.S.C. § 3117(a), provides for federal court enforcement of a state subsistence program consistent with ANILCA Section 804, 16 U.S.C. § 3114, in federal court. No doubt for purposes of avoiding Tenth Amendment difficulties, Section 807(a) reiterates that state programs are optional with the state, providing for federal court jurisdiction "if the State has fulfilled the requirements of Section 805(d)."

[39] 16 U.S.C. § 3115(d).

Secondly, the State's proposal carefully avoids suggesting that the State would be enacting regulations. Rather, the State would seemingly have the court provide continuing supervision through court decrees which would serve as the subsistence program. ANILCA Section 805(d)[40] expressly contemplated a state program carried out through a "state rulemaking authority". ANILCA Section 807(a)[41] plainly contemplates court review of that state rule-making, and if the state regulations on a subject are found wanting, there is a requirement for the submission of replacement regulations for court approval and incorporation in a decree. This arrangement vests the court with jurisdiction to provide a standard judicial remedy: review of administrative rule-making. What the State suggests is that the court in substance become the rule-maker.

Thirdly, there is a substantial risk of state court litigation which could seek to prevent the state from doing by indirection what the Alaska Supreme Court has expressly found to be unconstitutional – a rural Alaskan preference. Although this subject was not developed by the parties, it is the view of the court that such a suit would likely be successful.

The court and, judging from the summary and background statements that preceded his temporary regulations,[42] the Secretary viewed the dual federal-state fish and game management situation as undesirable. It would

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[40] 16 U.S.C. § 3115(d).

[41] 16 U.S.C. § 3117(a).

[42] 55 Fed. Reg. 27,114 (June 29, 1990).

be far preferable for there to be a unified, federally-qualified subsistence hunting and fishing program in the State of Alaska. One program would undoubtedly cost less, and would certainly be less complex in its implementation and operation. With that view before it, the court has seriously considered that sometimes situations must get worse before they get better, and a determination that Congress did not expressly (in ANILCA Section 805(a) through (c)) or impliedly authorize the Secretary to establish a subsistence hunting and fishing program in Alaska upon the failure of the state program, would certainly precipitate a crisis. Perhaps such a crisis would motivate either Congress or the state legislature to solve the problem which confronts all of us. However, the clarity of the congressional policy and purpose of ANILCA Title VIII, coupled with the clear grant of general regulatory power to the Secretary, convince the court that the position taken by the Secretary is both authorized and reasonable. The court cannot in good conscience reach the crisis-precipitating decision for which the State argues.

The court concludes that the Secretary, not the State of Alaska, is entitled to manage fish and game on public (federal) lands in Alaska for purposes of Title VIII of ANILCA. The State's motion for partial summary judgment[43] on Count III of its amended complaint is denied; and the court, on its own motion, concludes that the contentions contained in said Count III are without merit and subject to dismissal.

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[43] Clerk's Docket No. 113.

II.

Where Does ANILCA Apply?

The first issue has to do with "who" is entitled to regulate. The second issue addressed by this decision has frequently been referred to by the parties as the "where" issue. Assuming that the Secretary does have jurisdiction over the day-to-day management of fish and game for subsistence purposes, the parties disagree as to what lands are subject to the Secretary's regulation.

In their second amended complaint for declaratory and injunctive relief,[44] plaintiffs Katie John, Doris Charles, and the Village Council of Mentasta (the "plaintiffs") contend for their first cause of action that the waters of Tanada Creek and the Copper River are "public lands" as defined by Section 102[45] of ANILCA. First by temporary regulations (55 Fed. Reg. 27,114 (June 29, 1990)), and, more recently, by permanent regulations (57 Fed. Reg. 22,940 (May 29, 1992)), the Secretary has taken the position that navigable waters within the State of Alaska are not "public lands" for purposes of ANILCA. For purposes of this case, it is undisputed that the fishing site which is the subject of Katie John's complaint is on navigable waters.

The plaintiffs have moved for summary judgment on the "where" or "public lands" issue.[46] The federal defendants have responded with motions to dismiss or, in the

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[44] Clerk's Docket No. 106.

[45] 16 U.S.C. § 3102. For convenience and ease of reference, 16 U.S.C. § 3102 is hereafter referred to as "Section 102".

[46] Clerk's Docket No. 48.

alternative for summary judgment.[47] The State of Alaska, co-defendant with the federal defendants as to the Katie John complaint, also move to dismiss the plaintiff's claim.[48] These motions are all opposed. Here again, the court has invited parties to the jointly managed cases to take a position on the public lands issue, and some have done so. The court has heard oral argument.

Background

The site which has formed the basis for development of the "where" issue is near a fish camp situated at the confluence of Tanada Creek and the Copper River and is within the boundaries of Wrangell-St. Elias National Park and Preserve. This camp was once the location of a village known as "Batzulnetas". The village was abandoned in the early 1940's but a subsistence fishery continued there for many years.

Tanada Creek is a part of the Copper River system. Approximately 120 known sockeye and other salmon stocks ascend the Copper River system each year. The fish stocks mix with one another, and at a given time some twenty or more stocks may be migrating up the river. The Copper River sockeye stocks are harvested commercially near the mouth of the Copper River.

In 1964, the Alaska Board of Fish and Game closed Batzulnetas to fishing with nets and fishwheels. In 1984, Katie John and Doris Charles submitted a proposal to the

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[47] Clerk's Docket Nos. 2, 17, and 121.

[48] Clerk's Docket Nos. 38 and 124.

Alaska State Board of Fisheries requesting that the Batzulnetas area be opened to subsistence fishing. The proposal was denied. In 1985, plaintiffs filed a law suit against the State (*Katie John v. State of Alaska,* No. A85-0698-CV (D. Alaska) (hereinafter *"Katie John I"*)) under ANILCA Section 807(a).[49] The suit resulted in informal negotiations between the parties and an agreement to allow a limited fishery at Batzulnetas. In 1988, the Alaska Board of Fisheries adopted a regulation that allowed limited fishing at the Batzulnetas site. 5 AAC § 01.647(i).

In 1989, in continuation of *Katie John I,* the plaintiffs sought preliminary relief from the regulation that limited fishing at Batzulnetas. In June of 1989, this court issued a preliminary injunction that allowed full-time fishing at Batzulnetas from June 1 through September 1, or, in the alternative, until 1,000 sockeye were taken. Order, June 6, 1989 (No. A85-0698-CV).

In January of 1990, this court invalidated the 1988 regulation (5 AAC § 01.647(i)) and ordered the Alaska State Board of Fisheries to promulgate regulations that established a subsistence fishing priority at Batzulnetas. Before the State had an opportunity to promulgate such regulations, the Alaska Supreme Court decided *McDowell.*[50] As a result of *McDowell,* the State was no longer in compliance with ANILCA, and the regulation of subsistence fishing on "public lands" in the State of

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[49] 16 U.S.C. § 3117(a).

[50] See discussion at pages 7 to 9 hereof for a more complete discussion of what followed the *McDowell* decision.

Alaska was taken over by the Secretary. In order to quickly fill the regulatory void left by *McDowell*, the Federal Subsistence Board adopted temporary regulations on June 29, 1990. The temporary regulations were essentially the same as the state regulations that this court declared invalid in *Katie John I.*

On September 7, 1990, plaintiffs petitioned the Federal Subsistence Board for reconsideration of the temporary regulations that applied to subsistence fishing at Batzulnetas. After considering plaintiffs' motion for reconsideration, the Federal Subsistence Board concluded that the temporary regulations were not applicable to the Batzulnetas fishery and that management of the fisheries remained with the State. This decision was based upon an administrative determination of the National Park Service that the waters of Tanada Creek and Copper River in the vicinity of Batzulnetas are navigable. The Federal Subsistence Board informed the Plaintiffs that the temporary federal regulations only apply to "public lands"[51] and that navigable waters do not fall within the definition of "public lands". 50 C.F.R. § 100.3(b).

On December 5, 1990, the plaintiffs filed a complaint against the United States of America and the Secretary. The action was again brought pursuant to ANILCA Section 807(a).[52]

Plaintiffs state four causes of action, but only the first and second and the fourth are relevant to the issues now

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[51] ANILCA Section 102, 16 U.S.C. § 3102.

[52] 16 U.S.C. § 3117(a).

before this court.[53] In the first cause of action, plaintiffs allege that the federal defendants are required to provide a subsistence fishery at Batzulnetas and that their refusal to do so is in violation of Title VIII of ANILCA. Plaintiffs base the first cause of action on ANILCA Section 804[54] which provides a priority for the taking of fish and game for non-wasteful subsistence purposes on public lands. Plaintiffs allege that the reserved water rights doctrine and the navigational servitude in Alaska waters provide the United States with an interest in the waters of Tanada Creek and Copper River, and that these waters therefore fall within the definition of "public lands" as defined by ANILCA Section 102.

In the second cause of action, the plaintiffs allege that when the United States set aside land for plaintiffs under the Alaska Native Allotment Act of 1906, it also reserved sufficient water to fulfill the purposes of the allotments. Plaintiffs assert that such reserved water rights are interests to which the United States holds title, and thus presents an alternative reason why the waters of Tanada Creek are public lands.

In the fourth cause of action, the plaintiffs allege that the State of Alaska has no jurisdiction over the waters of

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[53] In the third cause of action, the plaintiffs claim that the federal defendants (through the National Park Service) have precluded the plaintiffs from obtaining reasonable access to Batzulnetas via "the Batzulnetas trail". This issue is not the subject of the pending motions.

[54] 16 U.S.C. § 3114.

Tanada Creek and the Copper River as regards subsistence fishing since they are "public lands" as defined in ANILCA.

Accordingly, the plaintiffs request rulings that the waters of Tanada Creek and the Copper River are "public lands"; that the Secretary's refusal to provide for a subsistence fishery at Batzulnetas is a restriction of a subsistence use, contrary to Title VIII of ANILCA; that the federal defendants be ordered to promulgate regulations that provide for subsistence fishing at Batzulnetas; and that the State of Alaska has no jurisdiction to manage subsistence uses of fish in the waters of Copper River and Tanada Creek.

What Constitutes "Public Lands" under Title VIII of ANILCA?

ANILCA Section 102 provides a three-tier definition of "public lands":

> As used in this Act . . .
>
> (1) The term "land" means lands, *waters, and interests therein.*
>
> (2) The term "Federal land" means lands the *title to which is in the United States* after December 2, 1980.
>
> (3) The term "public lands" means land situated in Alaska which, after December 2, 1980 . . . are Federal lands. . . .

(Emphasis supplied.)

When the Secretary of the Interior took over management of the subsistence uses of fish and wildlife on public

lands in June of 1990, he issued regulations that excluded all navigable waters in Alaska from the definition of public lands, and thus from the ambit of Title VIII.[55] Plaintiffs' complaint is a direct challenge of this regulation. To resolve this challenge, we must evaluate the Secretary's interpretation of ANILCA Section 102. We follow the procedure and authorities discussed above[56] in doing so.

Congress did not define the terms "interests" or "title" in the definition of "public lands" in ANILCA, nor did it make any reference to the common law doctrines of reserved water rights or navigational servitude. The parties have not unearthed any legislative history indicating that Congress considered these doctrines when it defined the term "public lands". Since Congress has not specifically defined the terms "interests" or "title", the court's first task is to determine what kind of authority Congress gave the federal defendants, as this will fix the degree of deference which the court must give to the federal defendants' interpretation of ANILCA Section 102.

Where the governing statute contains an express delegation of legislative authority over a specific provision,

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[55] The final regulation adopted by the Secretary of the Interior reads:

> (b) The regulations contained in subpart D apply on all public lands including all non-navigable waters located on these lands.

57 Fed. Reg. 22,951 (May 29, 1992); *see also* 50 C.F.R. § 100.3(b). The Secretary of Agriculture adopted identical parallel regulations at 36 C.F.R. § 242.3(b).

[56] See [pages 15 to 17 of supplemental appendix.]

Congress has in effect instructed the agency to engage in a deliberative process requiring the agency to weigh costs, benefits, and other competing interests, and arrive at a value judgment. Hence, judicial review of such legislative determinations is at its narrowest, asking only if the agency action were arbitrary and capricious. *See, Schweiker v. Gray Panthers,* 453 U.S. 34 (1981); *Mercy Hospital of Laredo v. Heckler,* 777 F.2d 1028 (5th Cir. 1985). An express delegation must be clear from the terms of the statute. *See, e.g., Batterton v. Francis,* 432 U.S. 416 (1976) (where the Secretary of Health, Education and Welfare was directed by statute to define the term "unemployment" in a provision of the Social Security Act).

ANILCA contains no such express delegation of legislative authority regarding the definition of "public lands". However, Section 102 contains an implicit delegation of power to the federal defendants.

Congress has created a program which necessarily requires the formulation of policy in order to fill a gap left by Congress. *Morton v. Ruiz,* 415 U.S. 199, 231 (1974). Section 814[57] directs the Secretary to promulgate "such regulations as are necessary and appropriate to carry out his responsibilities under this [Title]." Whether the federal government holds title to an interest in a specific plot of land or column of water will depend on how "interests" and "title" are defined. Without such further definition, the term "public lands" is ambiguous. Since these terms must be fleshed out in order for the Secretary to administer ANILCA, the Secretary necessarily has the

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[57] 16 U.S.C. § 3124.

authority to make such a determination. Consequently, the Secretary's interpretation of "public lands" is reviewed under a reasonableness standard. *Chevron*, 476 U.S. at 844.

Although the Secretary received extensive comments regarding its proposed construction of the scope of Title VIII, the Secretary's rule was not accompanied by any legal analysis and merely stated in a conclusory fashion that public lands do not include navigable waterways:

> Numerous comments were received concerning the definitions of Federal lands and public lands. All of these comments focused on the issue of jurisdiction over fisheries in navigable waters. Many felt that the definitions should include navigable waters to protect subsistence use and the subsistence priority. They strongly believe it was Congress' intent to protect subsistence rights as broadly as possible. Additionally, many individuals commented that most subsistence resources are found in navigable waters.
>
> The scope of these regulations is limited by the definition of public lands, which is found in section 102 of ANILCA and which only involves lands, waters, and interests therein title to which is in the United States. Because the United States does not generally own title to the submerged lands beneath navigable waters in Alaska, the public lands definition in ANILCA and these regulations generally excludes navigable waters.
>
> Consequently, neither ANILCA nor these regulations apply generally to subsistence uses on navigable waters. However, based upon

> specific pre-Statehood reservations of submerged lands, § ___,3(b) [sic] establishes that these regulations apply to navigable waters located on the identified public lands. The listed areas remain subject to change through further rulemaking pending a review and determination of pre-Statehood reservations by the United States.

57 Fed. Reg. 22,940 at 22,942 (May 29, 1992).[58] The plaintiffs argue that the term "public lands" in Section 102

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[58] The above quoted language is the Secretary's current form of his decision with respect to whether public lands are navigable waterways. Originally, the Secretary's explanation was as follows:

> There were many comments on the exclusion of navigable waters from the definition of public lands. Some comments regarding the exclusion of State-selected and Native-selected lands in the definition were received also. There was a great deal of concern that the exclusion on navigable waters eliminated the majority of subsistence fishing, critical to the well being of rural communities. Some concerns were expressed also that the sport take of migratory species on State lands affects their numbers for subsistence purposes on public lands.
>
> The United States generally does not hold title to navigable waters and thus navigable waters generally are not included within the definition of public lands. Navigable waters are those waters used or susceptible of being used in their ordinary condition as highways for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water.
>
> The scope of these regulations is limited by the definition of public lands in section 102 of ANILCA. Lands validly selected by the State or Native

should include all waters in which the United States has an interest by virtue of the reserved water rights doctrine and the navigational servitude. The court's task is to determine whether the Secretary's exclusion of these doctrines from his interpretation of Section 102 was reasonable. Each of the plaintiff's contentions will be examined in turn.

Reserved Water Rights Doctrine

Reservation of water rights is empowered by the Commerce Clause (U.S. Const. art. I, § 8) and the Property Clause (U.S. Const. art. I, § 3). The doctrine applies to federal enclaves, encompassing water rights in navigable and nonnavigable streams. When the federal government withdraws its land from the public domain and reserves it for a federal purpose, the government by implication reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. The reserved water rights doctrine reserves only that amount of water necessary to fulfill the purposes of the reservation, no more. *Cappaert v. United States*, 426 U.S. 128, 138 (1976).

The parties do not dispute that the federal government reserved certain water appurtenant to the Wrangell-

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corporations are therefore excluded from this public lands definition.

Temporary Regulation, 55 Fed. Reg. 27,114 at 27,115 (June 29, 1990).

The court perceives no significant difference between the two texts.

Saint Elias National Park when it was established by ANILCA in 1980. Congress clearly stated the purposes for which this park was created:

> To maintain unimpaired the scenic beauty and quality of high mountain peaks, foothills, glacial systems, lakes, and streams, valleys, and coastal landscapes in their natural state; to protect habitat for, and populations of, fish and wildlife including but not limited to caribou, brown/grizzly bears, Dall sheep, moose, wolves, trumpeter swans and other waterfowl, and marine mammals; and to provide continued opportunities, including reasonable access for mountain climbing, mountaineering, and other wilderness recreational activities. *Subsistence uses by local residents shall be permitted in the park, where such uses are traditional, in accordance with [the provisions of Title VIII].*

Section 201(9), 16 U.S.C. § 410hh(9) (emphasis added). Applying the *Cappaert* analysis, it is clear that an unquantified amount of water appurtenant to the park was reserved for the purpose of providing rural Alaskans with the opportunity to pursue their subsistence rights under Title VIII.

The court declines to use the reserved water rights doctrine as a means of determining the geographic scope of the Title VIII. Although the court does not reject the notion that the reserved water rights doctrine could have some application in this case, or that it could be of primary importance in a subsistence case in some other location in Alaska, the court concludes that the geographic scope of Title VIII is better determined by use of

the navigational servitude, as being more compatible with the findings[59] and policies[60] of Title VIII of ANILCA.

Navigational Servitude

Although both are grounded in the Commerce Clause, the federal navigational servitude is distinct from Congress's power to regulate navigable waterways. *Boone v. United States*, 944 F.2d 1489, 1493 (9th Cir. 1983), *citing Kaiser Aetna v. United States*, 444 U.S. 164, 173. Congress' authority to regulate waterways extends beyond waters that are navigable in fact[61], and is as broad as the needs of commerce. *Boone*, 944 F.2d at 1493.

By contrast, the navigational servitude is described as a "dominant servitude" and a "superior navigation easement". *Id.* at 1493-94. The purpose of the navigational servitude is to relieve the government of the obligation to compensate an owner of riparian, littoral, or submerged lands for acts which normally require compensation under the Fifth Amendment. *Id.* at 1494. The Ninth Circuit has explained the difference in the geographic scope of these two concepts:

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[59] ANILCA Section 801, 16 U.S.C. § 3111.

[60] ANILCA Section 802, 16 U.S.C. § 3112.

[61] Congress has the power under the Commerce Clause to regulate waterways that are navigable in fact, *The Daniel Ball*, 77 U.S. 557, 563 (1870); non-navigable tributaries, *United States v. Grand River Dam Authority*, 363 U.S. 229, 232 (1960); waters which were once navigable in fact but are no longer so, *Arizona v. California*, 283 U.S. 423, 453-54 (1931); and waters which may be made navigable by reasonable improvements, *United States v. Appalachian Electric Power*, 311 U.S. 377, 407-409 (1940).

The navigational servitude, unlike the power to regulate navigable waters under the commerce clause, is not coextensive with Congress' regulatory authority. First, unlike Congress' power to regulate waters for purposes of navigation, the navigational servitude "does not extend beyond the high-water mark" of navigable streams. *Rands*, 389 U.S. at 122, 88 S.Ct. at 266; *see also Kansas City Life Ins.*, 339 U.S. at 808, 70 S.Ct. at 890, *United States v. Willow River Co.*, 324 U.S. 499, 509, 65 S.Ct. 761, 767, 89 L.Ed. 1101 (1945). Thus, although the commerce clause power to regulate navigable waters permits, for example, regulatory authority over the non-navigable tributaries of streams, *see United States v. Grand River Dam Authority*, 363 U.S. 229, 232, 80 S.Ct. 1134, 1136, 4 L.Ed.2d 1186 (1960), the navigational servitude would not cover the same tributaries, *see United States v. Cress*, 243 U.S. 316, 326-27, 37 S.Ct. 380, 384, 61 L.Ed. 746 (1917), *Goose Creek Hunting Club, Inc. v. United States*, 518 F.2d 579, 582, 207 Ct.Cl. 323 (1975).

Second, the determination of navigability is different in different contexts. *Kaiser Aetna*, 444 U.S. at 171, 100 S.Ct. at 388. A waterway may be subject to the navigational servitude if it is navigable in fact in its natural state. *Kaiser Aetna*, 444 U.S. at 175, 100 S.Ct. at 390, *Cress*, 243 U.S. at 322-3, 37 S.Ct. at 382-83. Waterways are navigable in fact " 'when they are used, or are susceptible of being used, *in their ordinary condition*, as highways of commerce.' " *Cress*, 243 U.S. at 323, 37 S.Ct. at 383 (quoting *The Daniel Ball* 77 U.S. (10 Wall.) 557, 563, 19 L.Ed. 999 (1870) (emphasis in *Cress*)). By contrast, as explained above, navigability for purposes of the commerce clause authority to legislate, has been expanded to

> include both waterways once navigable but no longer so, and waterways never navigable but which may become so with reasonable improvements. *See Appalachian Electric*, 311 U.S. at 408, 61 S.Ct. at 299. Under this broad view of navigability, "[t]heoretically at least, there are no waters in the United States immune from [the power to regulate] navigation." Morreale, *supra*, at 9.

Id. at 1495-96 (footnotes omitted). The parties in this case frame the issue as whether the navigational servitude creates only a usufructuary right in the federal government (federal and state position) or a property interest to which the federal government holds title (plaintiffs' position). While this formulation of the "where" issue is not inappropriate, it is broader than necessary. The parties tend to focus on abstractions: what is land or an interest in land, and what is title to an interest in land? At the end of this discussion, we will focus more narrowly upon ANILCA Section 102 which includes in public lands interests in "waters" and upon the purpose of Title VIII of ANILCA.

The federal defendants cite *City of Angoon v. Hodel*, 803 F.2d 1016 (9th Cir. 1986), *cert. denied*, 484 U.S. 870 (1987), for the proposition that the United States does not hold title to the navigational servitude. *Angoon* involved a conveyance of land on Admiralty Island to a Native corporation under ANCSA. The Native corporation planned to harvest timber on the land. The City of Angoon sought an injunction to prevent the harvest, and objected that a subsistence evaluation required by

ANILCA Section 810[62] had not been prepared. Section 810 of ANILCA applies only if the land at issue is "public land". Although the harvest would take place only on land owned by the Native corporation, the City of Angoon argued that this use of corporation lands would affect subsistence uses on public lands, thus triggering application of Section 810. *Id.* at 1027. The Ninth Circuit rejected this broad reading of "public lands" and held that Section 810 did not apply. In a footnote, the Ninth Circuit addressed the City of Angoon's argument that "the EPA's and Corps' granting of permits under sections 402 and 404 of the Clean Water Act . . . required a section 810 subsistence evaluation because these determinations used 'public land': namely, a navigational servitude." *Id.* at 1027-28, n.6. The Ninth Circuit rejected this argument:

> "Public land" is defined to include all interests in land in which the United States holds title. ANILCA § 102(1)-(2), 16 U.S.C. § 3102(1)-(2). Since the United States does not hold title to the navigational servitude, the servitude is not "public land" within the meaning of ANILCA. *See United States v. Virginia Elec. & Power Co.*, 365 U.S. 624, 627-28, 81 S.Ct. 784, 787-88, 5 L.Ed.2d 838 (1961) (servitude is "power of government to control and regulate navigable waters in the interest of commerce") (quoting *United States v. Commodore Park*, 324 U.S. 386, 390, 65 S.Ct. 803, 805, 89 L.Ed. 1017 (1945)). For similar reasons, the Secretary was not required to perform a section 810 evaluation prior to transferring the Cube Cove lands to Shee Atika. Cube Cove is simply not "public land." *See* ANILCA §§ 102(3)

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[62] 16 U.S.C. § 3120.

> (B) and 810(c), 16 U.S.C. §§ 3102(3)(B) and 3120(c).

Id. The state defendants treat this language as dispositive of the issue before this court. However, in *Angoon* the issues were very different from those in this case. *Angoon* did not involve the scope of federal and state management of fish, nor did it address the subtleties regarding the terms "interests" or "title" presented by this case. The Ninth Circuit's observation in *Angoon,* that the United States does not hold title to the navigational servitude, appears to be premised on the conclusion that the servitude is a "power of government" rather than a property interest. *Angoon* contains no analysis of the character of the navigational servitude.

Five years after *Angoon* was decided, the Ninth Circuit had occasion to analyze in detail the genesis and scope of the navigational servitude, and it concluded that it does consist of a property interest. *Boone v. United States,* 944 F.2d 1489 (9th Cir. 1991), was a dispute over access to a lagoon in Hawaii. The United States contended that members of the public had the right to boat on the lagoon by virtue of the government's navigational servitude. The owners of the land surrounding the lagoon sought a declaration that the lagoon was not navigable and that they could therefore deny access to the public. The district court found that the lagoon was not navigable and entered judgment for the owners. In the course of describing the history and character of the navigational servitude, the Ninth Circuit commented:

> The label, "servitude," implies a property interest. How a constitutional grant of authority to Congress creates such an interest is explained

in *United States v. Twin City Power Co.*, 350 U.S. 222, 76 S.Ct. 259, 100 L.Ed. 240 (1956). The Court stated:

> "The interest of the United States in the flow of a navigable stream originates in the Commerce Clause. That Clause speaks in terms of power, not of property. But the power is a dominant one which can be asserted to the exclusion of any competing or conflicting one. The power is a privilege which we have called 'a dominant servitude,' or 'a superior navigational easement.' "

Id. at 224-25, 76 S.Ct. at 261 (citations omitted).

Boone, 944 F.2d at 1494, n.9. The Ninth Circuit's subsequent, and more thorough analysis of the character of the navigational servitude establishes, contrary to the comment in *Angoon*, that the servitude is not always accurately described as just a power. For purposes of ANILCA Title VIII, the navigational servitude is more properly characterized as an interest in waters. ANILCA Section 102 addresses interests in *both* "lands" and "waters".

The plaintiffs also argue that the Ninth Circuit's observation in *Angoon* is drawn into doubt by a subsequent Supreme Court decision, *Amoco Production Co. v. Hodel*, 480 U.S. 531 (1987). In *Amoco*, ANILCA Section 810 was once again used to challenge the action of a federal agency. The Secretary of the Interior granted oil and gas leases to oil companies off the coast of Alaska. The plaintiffs (Native villages and corporations) challenged the Secretary's failure to follow the requirements of Section 810 of ANILCA. The Supreme Court concluded that the Outer Continental Shelf (OCS) is not "public land as

defined in ANILCA. According to Section 102, "public lands" must be within the boundaries of the State of Alaska. The boundaries of the State of Alaska are delineated by its coastal waters which extend three miles from its coastline and end where the OCS commences.

In *Amoco*, as in *Angoon* and *Boone*, the issue on which we now focus was relegated to a footnote. The Secretary of the Interior had argued in the alternative that the United States did not hold title to the OCS. The Supreme Court indicated that Section 102 did not require fee title to be held by the United States in order for a tract to be "public land":

> The United States may not hold "title" to the submerged lands of the OCS, but we hesitate to conclude that the United States does not have "title" to any "interests therein." Certainly, it is not clear that Congress intended to exclude the OCS by defining public lands as "lands, waters, and interests therein" "the title to which is in the United States." We also reject the assertion that the phrase "public lands," in and of itself, has a precise meaning, without reference to a definitional section or its context in a statute.

Id. at 548-49, n.15 (citation omitted). The plaintiffs argue that since the Supreme Court reads the term "title" expansively, footnote 6 of *Angoon* has no further validity.

Footnote 15 in *Amoco* is a clear signal that the term "title" in Section 102 can refer to something less than technical fee title. This result was suggested, indeed we think required, because Section 102(1) of ANILCA expressly defines "lands" as including "interests" in both "lands" and "waters". Footnote 9 of *Boone*, and the cases

cited therein, reinforce the proposition that the United States may be considered to own an "interest" in property by virtue of the navigational servitude. The court concludes that, for purposes of Title VIII of ANILCA, the United States holds title to an interest in the navigable waters of Alaska.

The court also concludes that the Secretary's construction of Section 102 was not reasonable because his interpretation of "interests" in "waters" and "title" was too narrow. The court does not reach this conclusion solely upon the basis of the foregoing authority. The court has given equal consideration to whether the position taken by the Secretary does or does not advance the congressional purpose and policy of ANILCA, which are found in ANILCA Sections 101(c) and 802(1).[63]

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[63] ANILCA Section 101(c), 16 U.S.C. § 3101(c), provides:

> It is further the intent and purpose of this Act consistent with management of fish and wildlife in accordance with recognized scientific principles and the purposes for which each conservation system unit is established, designated, or expanded by or pursuant to this Act, to provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so.

ANILCA Section 802(1), 16 U.S.C. § 3112(1), provides:

> It is hereby declared to be the policy of Congress that –
>
> (1) consistent with sound management principles, and the conservation of healthy populations of fish and wildlife, the utilization of the public lands in Alaska is to cause the least adverse impact possible on rural residents who depend upon subsistence uses of the resources of such lands; consistent with management of fish and wildlife in

By limiting the scope of Title VIII to non-navigable waterways, the Secretary has, to a large degree, thwarted Congress' intent to provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so. Much subsistence fishing and much of the best fishing is in the large navigable waterways where one has access to the most fish as opposed to the smaller tributaries or lakes where, for example, salmon go to spawn. The Tanada Creek subsistence fishery is at Batzulnetas, at the confluence of the Copper River and Tanada Creek, not far upstream in some non-navigable tributary. Fish, salmon in particular, mature on the high seas. They spawn in the shallows of far upland creeks and lakes which are reached only after passing the gauntlet of commercial fisheries in the territorial seas (especially in Prince William Sound insofar as the Copper River is concerned) and sport and Alaska's wide open subsistence fishing on the entire Copper River. The food quality of salmon is substantially degraded by the time these fish reach the spawning grounds. By the regulations which excluded navigable waters from the jurisdiction of the Federal Subsistence Board, the Secretary abandoned to the non-consistent[64] state subsistence program the largest

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> accordance with recognized scientific principles and the purposes of each unit established, designated, or expanded by or pursuant to titles II through VII of this Act, the purpose of this subchapter is to provide the opportunity for rural residents engaged in a subsistence way of life to do so[.]

Section 802 (§ 3112) is quoted in full at [pages 5 to 6 of supplemental appendix.]

[64] See ANILCA Section 805(d), 16 U.S.C. § 3115(d).

and most productive waters used by rural Alaskans who have a subsistence lifestyle.

As additional grounds for its ruling, the court notes that Congress specifically invoked its constitutional authority under the commerce clause "to protect and provide the opportunity for continued subsistence uses" when it enacted Title VIII.[65] Thus, even if the navigational servitude is viewed as a power to regulate rather than a property interest, Congress exercised that power to protect subsistence uses by rural Alaskans.

Conclusion

The court concludes that the Secretary, not the State of Alaska, is entitled to manage fish and wildlife on public lands in Alaska for purposes of Title VIII of ANILCA. The State's motion for partial summary judgment[66] on Count III of its amended complaint is denied. Count III is dismissed.

The court further concludes that the Secretary's interpretation of Section 102 is unreasonable. For purposes of Title VIII, "public lands" includes all navigable waterways in Alaska. The federal defendants' motions to dismiss the plaintiff's complaint for failure to state a claim upon which relief, or in the alternative for summary judgment (Clerk's Docket Nos. 2, 17, and 121) are denied. The State of Alaska's motions to dismiss or for summary judgment (Clerk's Docket Nos. 38 and 124) are denied.

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[65] ANILCA Section 801(4), 16 U.S.C. § 3111(4).

[66] Clerk's Docket No. 113.

The plaintiff's motion for partial summary judgment (Clerk's Docket No. 48) is granted.

DATED at Anchorage, Alaska, this 30 day of March, 1994.

/s/ H. Russel Holland
United States
District Judge

cc: *R. Anderson (NARF)
*M. Walleri
*J. Johnson (ALS)
*D. Dunsmore
*M. Stanley
*P. Giannini
*J. Grace (AAG-200)
* E. Boyko
* L. Gordon (ASHBURN)
* D. Mitchell
* E. Smith
* J. Bailey

*(w/att appendix)

APPENDIX

An examination of the legislative history of Title VIII reveals the following evolution in Congressional policy.

The initial House bill sponsored by Congressman Udall (H.R. 39, Jan. 4, 1977, Vol. 1 at 204, Alaska Department of Fish and Game, Legislative History of ANILCA),[1] specifically provided that the Secretary of the Interior would manage subsistence uses of fish and game on Alaska's public lands by issuing regulations on seasons and bag limits. ADFG, Vol. 1 at 222-231.

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[1] Hereinafter "ADFG, Vol. ___ at ___".

Next, the House Interior Committee proposed amendments that narrowed the Secretary's role by allowing the State of Alaska to manage subsistence uses on public lands. However, the amendments specifically stated that the Secretary could suspend the State's management and take over such management if he determined that the State's program did not comply with the subsistence preference in Title VIII (then Title VII). House Interior Committee Report, April 7, 1978, ADFG, Vol. 33 at 32-38, 186-192, 237-240.

The House Merchant Marine Committee then proposed that the Secretary's role should be limited even further. Federal regulation of subsistence uses of fish and wildlife on public lands was eliminated; the burden of all such regulation fell on the State. If the State's program did not comply with the federal subsistence preference, the Secretary was authorized to close the public lands to consumptive uses while the State redrafted its regulations. House Merchant Marine Committee Report, May 4, 1978, ADFG, Vol. 33 at 417, 496, 509-515. The House passed a version of ANILCA on May 23, 1978, that included the House Merchant Marine Committee's version of Title VIII (VII). ADFG, Vol. 2 at 419, 512-539.

The Senate Energy Committee issued a report on October 9, 1978. The Energy Committee revised the structure of Title VIII and inserted a judicial enforcement provision, Section 807, in place of the Secretary's closure authority. Under the proposed Section 807, the Secretary was to act as an advocate in federal court on behalf of parties aggrieved by the State's failure to provide for the subsistence preference, in specific instances.

Section 807 is meant to provide a mechanism to rectify individual instances of the State's non-compliance with Title VIII. Previous House versions allowed the Secretary to step in and promulgate a regulation addressing a need in a particular time and place when he determined that the applicable state regulation did not comport with Title VIII. The initial version of Section 807 authorized the Secretary to obtain a court decree on behalf of an aggrieved party that would direct the State to promulgate a new regulation. The Senate Committee Report described the genesis of Section 807 as follows:

> The subsistence management provisions of H.R. 39 as passed by the House of Representatives reflect a delicate balance between the traditional responsibility of the State of Alaska for the regulation of fish and wildlife populations within the State and the responsibility of the Federal government for the attainment of national interest goals, including the protection of the traditional lifestyle and culture of Alaska Natives. Although the committee has adopted a subsistence management system similar in concept to the House approach, after careful consideration the committee has modified the Federal-State relationship in a number of important aspects.
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> Section 704 of the House bill requires the State to develop and implement a subsistence management program which includes a regionalized regulatory system for the management of fish and wildlife on the public lands for subsistence uses, and laws or regulations which provide preference for nonwasteful subsistence uses by local residents consumptive uses of fish

and wildlife on the public lands. The State regulations must further provide preferences for subsistence uses shall be based upon local residency, customary and direct dependence upon such populations as the mainstay of livelihood and the availability of alternative resources. The committee determined that inclusion of these requirements as part of a federally mandated State program is an unnecessary intrusion into traditional State responsibility for fish and wildlife management. Consequently, the committee retained both of these requirements in sections 804 and 805 respectively, but has eliminated the requirement that they be included as part of a formal State program.

Section 705(c) of the House bill requires the Secretary to take certain administrative action if he determines that the State has failed to establish a subsistence program or to implement such a program in a manner which adequately satisfies the preference for subsistence uses. While the committee has retained broad Federal guidelines to ensure the adequate implementation of the subsistence preference on the public lands and the Secretary's ongoing responsibility to monitor the States's implementation of such preference, the Committee believes that the responsibility of the Secretary to ensure the protection of subsistence uses and the satisfaction of subsistence needs of Alaska Natives and other rural residents can best be met by providing legal representation for such residents before the United States District Court in appropriate instances in which the Secretary has determined, after consultation with the State, that the State has not timely or adequately provided for the preference for subsistence uses.

> Although it is the intent of the committee to neither enlarge nor diminish any existing authority of the Secretary to take appropriate administrative action to protect subsistence uses and satisfy subsistence needs of rural residents of Alaska, the committee believes that the responsibilities and authorities of the Secretary and the United States District Court set forth in section 804-807 ensure the protection of subsistence activities and the discharge of Federal responsibilities.

Sen. Rep. No. 95-1300 at 196-7, 95th Cong., 2d Sess. (1978). [ADFG, Vol. 33 at 752-753.]

While the above quoted legislative history specifically defines the Secretary's function when the State's regulations fail to comply with Title VIII in specific instances, it does not give the state and Federal regulators any guidance as to their respective roles should the State's entire subsistence program be declared illegal.

The initial version of Section 807 also provided that the Secretary would monitor the State's administration of its program (Section 806), and that the Secretary would establish regional advisory councils if the State failed to do so (Section 805). The Secretary also retained his traditional authority to manage public lands by regulating access and wildlife habitats. ADFG, Vol. 33 at 555, 582-588, 751-753, 775-786, 841, 987-988.

H.R. 39 returned to the House in the 96th Congress and the House Interior Committee issued a report on April 18, 1979, in which it adopted the Senate Committee's version of Title VIII (VII). ADFG, Vol. 34 at 1, 56-66, 145, 239-241. A group of dissenters presented additional

views which further demonstrated that the Secretary's duties had been reduced from its original function as sole regulator. *Id.* at 389, 546-556. The House Merchant Marine Committee issued a report on April 23, 1979, that echoed the Senate Energy and House Interior Committee's conclusions. ADFG, Vol. 35 at 1, 4349, 161-164. The House passed this version of ANILCA on May 16, 1979.

The Senate Energy Committee issued the final committee report on ANILCA on November 14, 1979. The judicial enforcement provision still required the Secretary to act as an advocate for parties aggrieved by the State's failure to provide for the subsistence preference, in specific instances. ADFG, Vol. 35 at 271, 308-314. This version of ANILCA was passed by the Senate on August 19, 1980, and was referred to the House in November of 1980.

The final amendments to Title VIII were made by Concurrent Resolutions 452 and 453 only days before ANILCA became law on December 2, 1980.[2] Senator Stevens submitted a prepared document as legislative history of the changes, which was printed in the Congressional Record. ADFG, Vol. 39 at 155-158. The amendment to Section 807 eliminated the Secretary's role as advocate in federal court and substituted a private right of action for parties aggrieved by the State's failure to provide for the subsistence preference. Representative Udall submitted the concurrent resolutions in the House. *Id.* at 499-501. This eleventh-hour revision to Section 807

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[2] Congressman Udall lodged a detailed discussion of the pending bill in the Congressional Record on November 12, 1980. ADFG, Vol. 39, at 133-151. See discussion of Title VIII, *id.* at 145-149.

became law with the passage of ANILCA on December 2, 1980.